PPG Industries, Inc., Lexington Plant, Fiber Glass Division *and* Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 11-CA-9493 and 11-CA-9620

November 23, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 25, 1982, Administrative Law Judge John H. West issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, PPG Industries, Inc., Lexington Plant, Fiber Glass Division, Lexington, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharge of Ronald Reagan on July 29, 1980, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT unlawfully discharge any of our employees or discriminate against them in any manner because of their union affection or because they engage in union activities.

WE WILL NOT unlawfully threaten to discharge or mistreat any of our employees to discourage their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL offer Ronald Reagan immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, with the wage rate he enjoyed at the time of his discharge, plus any increase, without prejudice to his seniority and other rights and privileges, and make him whole for all losses suffered by him as a result of our discrimination against him, with interest.

WE WILL expunge from our files any reference to the disciplinary discharge of Ronald Reagan on July 29, 1980, and we will notify him that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him.

PPG INDUSTRIES, INC., LEXINGTON PLANT, FIBER GLASS DIVISION

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge: This case was heard at Winston-Salem, North Carolina, on August 24 and 25, 1981. Charges were filed by Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In stating that *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), does not apply to pretext cases we believe the Administrative Law Judge meant to say that it is unnecessary in such cases to formally apply the analysis set forth in that decision.

As we stated in *Limestone Apparel Corp.*, 255 NLRB 722 (1981), ". . . a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel."

In adopting the underlying Decision, Member Jenkins finds it unnecessary to clarify the rationale provided by the Administrative Law Judge.

with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in Case 11-CA-9493 on October 30, 1980[1] (amended December 2) and in Case 11-CA-9620 on January 2, 1981 (amended January 8 and March 3, 1981). A complaint was issued in the first case on December 10. On February 17, 1981, a complaint was issued which consolidated the cases and alleges that (1) on or about July 28 Respondent discharged Ronald Reagan because he joined or assisted the Union or engaged in other union activities or concerted activities for the purpose of collective bargaining or mutual aid or protection, (2) on July 7, 1978, a majority of Respondent's employees in a specified unit by an election in Case 11-RC-4508 designated and selected the Union as their representative for the purposes of collective bargaining and, on September 11, 1979, after a hearing on objections, the Union was certified as the exclusive representative of the employees, (3) Respondent refuses to bargain in good faith with the Union and that Respondent, unilaterally and without prior notification to or consultation with the Union, changed wages, hours, and working conditions of employees in the aforesaid bargaining unit by on or about December 18 reinstituting a requirement that employees be physically relieved at their individual job stations before they could leave work, (4) pursuant to the above-described unilateral action Respondent on December 29 terminated and thereafter refused to reinstate its employee Janice Yoast Mitchell, and (5) the acts of Respondent described above collectively constitute unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended (the Act). At the hearing, the General Counsel further amended the complaint to include the allegation that during the last week of July 1980 Respondent's supervisor, John Tesh, threatened its employees with unspecified reprisals because they engaged in union activities. Respondent denies all of these allegations.

Upon the entire record,[2] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Pennsylvania corporation which, as here pertinent, has a plant located in Lexington, North Carolina, where fiber glass products are manufactured. Respondent admits and I find that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 1980, unless otherwise stated.

[2] The General Counsel's unopposed motion to correct the transcript, dated October 28, 1981, is granted and received in evidence as G.C. Exh. 5.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *A Preliminary Matter*

Two of the allegations in the above-described consolidated complaint, namely, Respondent's refusal to bargain with the Union over an alleged postelection policy change and an employee action allegedly taken pursuant to the alleged policy change, are justiciable issues only if the election in question is valid. As indicated above, the results were certified. Respondent, however, refused to bargain with the Union and the Board, after taking official notice of the record in the representation proceeding, found in *PPG Industries, Inc.*, 255 NLRB 765 (1981):

> . . . that Respondent has, since September 26, 1979, and at all times thereafter refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

The Board's decision was reviewed in *PPG Industries, Inc.* v. *N.L.R.B.*, 671 F.2d 817, 823 (4th Cir. 1982), with the court concluding that "[t]he findings that there was a fair election cannot stand. We, accordingly, deny enforcement of the bargaining order." A petition for rehearing was recently denied. While an attempt may be made to have the Supreme Court consider this matter, unless and until the Supreme Court reverses the Fourth Circuit, its decision is the law of the case. The election, therefore, cannot be recognized. Consequently, Respondent had no legal obligation to bargain with the Union over an alleged postelection policy change.[3] And any action taken pursuant to the alleged policy change would not be reviewable solely on the basis that the alleged policy change is subject to challenge because Respondent failed to bargain over it with the Union.[4] The com-

[3] If a bargaining obligation existed, then Respondent violated the Act. It stipulated that it did not notify or bargain with the Union about this matter. Respondent's December 26, 1980, notice, G.C. Exh. 3, demonstrates that a policy which was previously followed in "emergencies and snows" was going to "apply in any circumstances whenever assignments are not covered," and "an unrelieved [e]mployee may have to work . . . overtime . . . ." As pointed out by the Board in *Master Slack*, 230 NLRB 1054 (1977), enfd. 618 F.2d 6 (6th Cir. 1980), an employer is obligated not to change established working conditions without consulting the Union. Consequently, Respondent's unilateral changes would violate the Act if the election were valid.

[4] Even if a bargaining obligation existed, it is my opinion that Mitchell's discharge does not violate the Act. She was specifically advised by her supervisor that Respondent did not, late in the afternoon of Christmas Eve 1980, have someone to relieve her. And she was specifically directed by her supervisor to work overtime while an attempt was being made to find someone to relieve her; Mitchell was told to remain at her job until she was relieved. More than once she advised her supervisor that she would not remain and work overtime. And at the end of her normal shift Mitchell left even though she was not relieved. When later confronted by management, she claimed that, while standing 20 feet away, she saw someone at her position and assumed she was relieved. Mitchell was concerned enough to attempt to establish that there may have been some basis for claiming that she was relieved but not concerned enough to incur the risk of establishing that she was not, in fact, relieved. Her discharge did not result solely from a violation of the relief policy. Mitchell was specifically told to remain until she was relieved,

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plaint, to this extent, is dismissed. Remaining for consideration herein are the discharge of Reagan and the alleged Tesh threats.

B. *The Facts*

After being out sick for 2 days, Reagan returned to work on July 29. He was taken to the office of Jerry Strong, personnel assistant, by Bill Cullum, an area supervisor in the forming department. Reagan testified that Strong reviewed Reagan's record with him, discussing past reprimands and counseling sessions, and told him that he had a bad work record; that he was not sure exactly what went on during this meeting; that he did not argue; that he "figured . . . [he] was fired when . . . [Cullum] took . . . [him] up there"; and that when Strong asked him if he reported his absence, he said "yea, I called in both days" but Strong said Respondent was terminating Reagan because he did not report in. Strong's and Cullum's version of what was said at this meeting are basically in agreement with Reagan's version except that Cullum testified that, when Reagan was told that there was no call in on July 27, "there was no argument, no challenge of that unreported on Sunday." Strong's memorandum of this meeting states, "Ron was terminated on 7/29/80 due to excessive absenteeism and unreported absence on 7/27/80." (Resp. Exh. 13.) The memorandum also notes that during the meeting "Ronald complained about the way he was treated by his supervisor and that he always did his job." Cullum testified that during the meeting Reagan "raised a question in general about the attitudes of some of our foremen . . . ."

A union organizing campaign began at the involved facility in March 1978. Four months before that, November 20, 1977, Reagan was the subject of the following employee personnel report:

> I talked to Ronald today concerning his attendance. I told Ronald since coming to the forming department in August he has been out six days and the Dept. average was only four days. I explained to Ronald the importance of being here and that his attendance was getting in bad shape. I asked Ronald if he could help us out on this and improve his attendance. Ronald said he would.[5]

During the campaign Reagan was on the In-Plant Organizing Committee (IPOC), and he signed people up for the Union, handed out leaflets, and wore a Teamsters T-shirt and flowers.[6] Also, he participated in union rallies in front of the plant after work.

Regarding statements made to him during the campaign and after the election, Reagan testified that before the election in 1978 Jerry Michael, a crew foreman, told him that "[n]o matter how the election went, that the company would never sign a contract and they would get rid of everybody who got the union down on the company"; that Michael knew Reagan supported the Union because he told Michael he did, and Michael also told Reagan "it didn't make a damn how long it took but PPG would get rid of . . . [Reagan]": that late in 1978 or early in 1979 Curtis Putnam, an area supervisor, said to Reagan, who was temporarily on light duty because he had been injured, "if . . . [the job that Putnam gave Reagan] wasn't shitty enough that he would find something worse for . . . [Reagan] to do, and if . . . [Reagan] would come around to the Company side it would be easier on . . . [him]"; that 6 months before he was fired Bob McGirt, a crew foreman, with Bobby Lumsden, an area supervisor, present told Reagan, with respect to people who were wearing Teamsters shirts in the area, "we are going to get rid of all of the people in the union and that . . . [Reagan] was a damn fool if . . . [he] thought that [he] was going to benefit by the union, that the only thing the union could get . . . [him] was unemployed";[7] that 6 weeks before he was fired John Tesh, a spare or pool foreman, told him, after taking and then returning a leaflet Reagan was reading on his return from the breakroom, that "[he] . . . was neglecting . . . [his] job. [He] . . . was taking up too much time with other activities; that 3 or 4 days before he was fired Reagan complained to Tesh about the fact that he was being switched from job to job and Tesh "said that he had tole [sic] . . . [Reagan] time and time again that the only thing that the Union would do was to get me in trouble, and this is what was happening";[8] that 3 days before he

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not strictly as a matter of policy but as a matter of specific need at that time. The allegation that Mitchell was discharged as the result of an unlawful policy change cannot, in my opinion, be used to shield her from a reasonable sanction for her unreasonable conduct.

[5] Resp. Exh. 12.

[6] Reagan testified that he handbilled both before and after the election. Regarding his testimony in the objections case hearing, *supra*, that he did not distribute literature for the Union, Reagan testified herein that "Maybe I didn't understand the question. I could very well not being [sic] handing out leaflets if I was out there signing up people for the Union." Reagan has only a seventh grade education.

Reagan was a member of the IPOC from its outset and Respondent was formally notified of this. As noted in the quoted material below, no specific individuals are named and it should not be inferred that Reagan perpetrated any of the described acts. In its decision in *PPG Industries, Inc.* v. *N.L.R.B.*, *supra* at 819, the Fourth Circuit stated as follows:

> With respect to economic coercion, many PPG witnesses testified at the Hearing that IPOC members made statements threatening disparate economic treatment unless employees became members of the Union. The . . . [objectionable] behavior alleged in Objection 4 included five credited situations in which IPOC members threatened other employees with physical or property harm. One male IPOC member asked a female employee, who had recently revoked her union card, if she knew what happened to turncoats. He told her they "fall down the scrap shoot [sic]." Another male IPOC member threatend another female pro-company employee. He told her that "[T]here are women riding by themselves that are going to get it, you had better watch out . . . . [Y]ou will feel funny if you go out and your tires are cut, or your home burned." Another IPOC member identified himself as such to a pro-company employee and told the pro-company employee that "they ought to stand [him] up against the wall and shoot [him] because of [his] beliefs against the Union." Another pro-company employee testified that a pro-Union employee, believed to be an IPOC member, threatened that "if we lose this election, we're going to whip your ass." The testimony indicated that a number of supporters for both sides were in the area at the time of the threats. Finally, a male IPOC member threatened a female employee that if she crossed a picket line she would find her tires cut and her windows "busted."

[7] The first time Reagan told the Board about McGirt's statement was the day before the hearing herein, August 23, 1981.

[8] While Reagan told the Board about this alleged statement the day before the hearing herein, August 23, 1981, he apparently testified that he told the Board about it previously. Four statements of Reagan were

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was fired Reagan complained again to Tesh who replied "that . . . [Reagan] might as well . . . [go] ahead and quit, that they was [sic] going to fire . . . [Reagan] anyhow, it was just a matter of time, that [Reagan] wouldn't be hard to replace."

Michael, Putnam, McGirt, and Tesh all deny the above-described statements. Tesh also denied that Reagan complained to him about the way he, Reagan, was being treated by management. Lumsden testified that he was working a different shift in a different area from McGirt when, according to the testimony of Reagan, Lumsden was supposed to have witnessed a statement made by McGirt to Reagan. The first three named supervisors saw Reagan wearing a Teamsters shirt during the campaign. Lumsden was not asked whether he saw Reagan wearing a Teamsters shirt. And Tesh testified that he did not see Reagan wearing a Teamsters shirt.

On August 27, 1979, the following employee personnel report on Reagan was drafted:

> I talked with Ronnie concerning his attendance. I told Ronnie that his attendance was getting in terrible condition. I also told Ronnie with the attendance record that he presently has that it couldn't be tolerated. I told Ronnie if his attendance didn't improve that if he was absent again that he would be counseled by the area supervisor or our personel [sic] department for further actions including possible termination from the company. Ronnie stated that he would correct his attendance problem.[9]

On March 11 the following employee personnel report on Reagan was drafted:

> I talked with Ronald today about his attendance record for 1979 and 1980. Richard York set [sic] in on the discussion.
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> I showed Ronald his attendance record for 1979 where he was absent 20 times, and his 1980 record where he was absent 3 times and late 4 times.
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> I told Ronald that he had been talked to about his attendance record in 1977, 1978 and 1979, and I would not put up with another year like he had in 1979. He was to improve his attendance record or he would lose his job—simple as that. That it would be his doings and not mine. I told him to make up his mind to be here every day and he could do it.
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> Ronnie said he understood, and he would do better on his attendance.[10]

Two of Reagan's 1979 absences, February 17 and 18, were unreported absences and on November 2, 1979, Reagan was late and unreported for 6 hours. (Resp. Exh. 11.) Up to the time he was terminated Reagan had eight absences in 1980.[11]

Respondent's Exhibit 13 points out that Reagan "gave up the job of Tank Captain on 7/25/80 due to pressure and personal problems." Reagan testified that he gave up the job of tank captain, he "went to York and signed off of it," because when the production Reagan was responsible for dropped off and Reagan was questioned about it, a glass winder, James Peck who worked for Reagan and who, according to Reagan, was responsible for the decline, was not disciplined. Instead, Reagan was given another job. He then gave up the tank captain job, and he testified "that is when they started moving me from position to position. I would be on four different jobs in one day."

Reagan testified that about midshift on July 26 he was throwing up and he spoke with his immediate supervisor, Richard York, explained his problem, and asked to be allowed to leave work; and that York advised Reagan that he could not leave because York did not have someone to relieve him. York did not recall this.

For the next 2 days, July 27 and 28, Reagan was out sick. All agree that the July 28 absence was properly reported.[12] Respondent asserts, however, that the July 27 absence was unreported and this triggered a review of Reagan's absence record which resulted in his termination. According to Reagan's testimony, he called Respondent between 7:30 a.m. and 7:50 a.m. to report his absence and he spoke with someone who he thought was York. Reagan's wife, Phyllis, testified that she attempted to call Respondent regarding her husband's illness on July 27 but the line was busy. Since she had to go to work,[13] she told her husband to call in. Reagan's 14-year old daughter, Cindy, testified that on the morning of July 27 she overheard her mother tell her father that she was late for work and he would have to call; that her mother gave her father a card with the PPG telephone number on it; that her mother left for work; and that shortly thereafter, while in the bathroom, she heard her father talking in another room but she was not able to hear what her father said. York testified that on July 27 he was working as a crew foreman; that Reagan did not call him on July 27 to report his absence; that it is his practice to report all "call-offs" on the logsheet (Resp. Exh. 4); and that he examined the logsheet and there was no indication that Reagan called in on July 27. On cross-examination, York testified that possibly he did not take all the call-offs on July 27 since there were several people in the office and someone else could take calls "but it is procedure for whoever takes it off to write it on the call-off sheet." In response to the question "[h]ave you ever taken a call-in and for some reason did not write it up on the absence report immediately," York responded "I'm not sure. I could have, but I don't remember." Clark testified that the call-in sheet is located in the

given by the General Counsel to Respondent's counsel. On cross-examination Reagan could not find any reference to this alleged Tesh statement in his November 6, 1980, affidavit.

[9] Resp. Exh. 9. The report was originated by Michael.

[10] Resp. Exh. 10. Don Bailey, area supervisor, originated the report.

[11] According to Resp. Exh. 11, on July 22, Reagan was also absent because of a reported death. Strong testified that funeral pay is limited to those involving the employee's immediate family and certain relatives; and that "you may or may not consider the . . . reported death on the 22nd" in determining Reagan's total number of absences for 1980.

[12] There is a question as to who actually called Respondent to report Reagan's absence. Reagan and his wife testified that she called in for him and spoke to Charlie Clark. On the other hand, while Clark agreed that he took the call and filled in the call-off sheet, Resp. Exh. 4, he testified that it was Reagan himself who called.

[13] In July 1980 and at the time of the hearing Phyllis Reagan worked at Respondent's involved facility.

assistant foreman's office but the phone also rings in the crew foreman's office.

Cullum testified that on July 28 York advised him that Reagan had a reported absence for that day and an unreported absence for July 27; that he reviewed Reagan's record with York; that he then brought Reagan's records to Strong and recommended to Strong that Reagan be terminated; that Strong wanted to review the records and talked to his boss; and that after Strong discussed the matter with Personnel Director Dick Cameron, Strong advised Cullum on July that Reagan would be terminated. Strong testified that Cullum brought him Reagan's records with a department recommendation that Reagan be terminated; that Cullum recommended that Reagan be terminated; that he reviewed the record with Cullum and he told Cullum that he tentatively agreed but that he wanted to further analyze the record and speak with Cameron, manager of employee relations; that he reviewed the record with Cameron who concurred with the recommendation to terminate Reagan; and that the recommendation was approved by Harold Maruca and Jesse Hogg, Respondent's legal counsel.

C. *Contentions*

Citing *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980), where the Board concluded that Respondent engaged in extensive unlawful activity during the involved union campaign at its Lexington plant, the General Counsel points out, on brief, that among the supervisors found by the Board to have violated Section 8(a)(1) of the Act were Michael and McGirt; and that the Board affirmed the Administrative Law Judge and did not credit Tesh's testimony in that proceeding.[14] Assertedly Tesh was incredible, and inasmuch as he admitted both the opportunity and the circumstances for making the illegal threats to Reagan, he should be discredited and be found to have violated the Act. Similarly, the General Counsel argues, the denials of the other supervisors that the above-described statements were made to Reagan should not be credited. Assertedly it should be concluded:

> . . . that the Section 8(a)(1) violation committed by Tesh, in tandem with the other threats made to Reagan, are, as the Board said in *Pandair Freight Inc.*, 253 NLRB No. 134, at 3: "compelling background evidence of Respondent's hostility to [Reagan's] union activities and its intention to discover a pretextual rationale for [his] discharge should he persist in engaging in union activities." [Additions to quote from *Pandair Freight Inc., supra*, found in General Counsel's brief.][15]

According to the General Counsel, York either took Reagan's call-off on July 27 and failed to note it on the logsheet or some other supervisor took the call and failed to note it. Admittedly the testimony of Reagan's daughter is no more than circumstantial, but the General Counsel argues that it lends credence to Reagan's testimony that he did make the call. It is asserted there was no unreported absence by Reagan.

While the General Counsel concedes that Reagan's attendance record was not the best, it is argued that Reagan had improved in that, in the 4.5 months after his March 1980 counseling, Reagan was out only 6.5 days (one of these days was for a reported death which may not be chargeable against Reagan) and was not tardy at all, as opposed to the 4.5 months before the March counseling, when Reagan was absent 8 days and tardy 5 days.

It is argued by the General Counsel that:

> . . . in view of the continuous nature of the Union campaign and Respondent's tilt toward being a recidivist violator of the Act, it would seem to have been a 'logical' step for Respondent to single out a Union supporter at this time for retaliation and reminder to its other employees. [Footnote omitted.] That Respondent fully intended to discharge Reagan because of his Union activities is shown by the threats of discharge aimed at him by supervisors aware of his Union activities, particularly the threats of John Tesh just before Reagan was fired.[16]

Respondent, on brief, argues that Reagan's record of absences was within the range of absences for which other employees were terminated; and that, when Reagan's absence record is compared with the 272 active employees in his department, his absentee rate was 351 percent greater than his fellow department employees.[17] It is pointed out by Respondent that its plant guide (Resp. Exh. 5, p. 10), which is given to employees during their orientation, states:

> *Repeated absence or tardiness.* This disrupts operations and is unfair to those who are regular in their attendance and prompt in reporting to work. Three or more unreported absences is a distinct violation.

With respect to the statements supervisors allegedly made to Reagan, Respondent submits that the alleged

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[14] Describing the testimony of a management employee witness therein, *vis-a-vis* the testimony of an employee witness, the Administrative Law Judge concluded at 1152:

> [The management witness] in his testimonial demeanor was less convincing. The same may be observed of Tesh who could not in any event be considered as wholly impartial since his interests were clearly aligned with that of Respondent as shown not simply by his outspoken support of Respondent during the Union's campaign but also by the fact that he was admittedly under active consideration for promotion to a supervisory position at the time of the hearing.

[15] G.C. br., p. 6.

[16] G.C. br., p. 9. Subsequent to filing the brief, the General Counsel filed a motion dated March 8, 1982, requesting that official notice be taken of the Board's decision in *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 260 NLRB 401 (1982). It is asserted by the General Counsel that this decision further supports the General Counsel's position that Respondent violated the Act as alleged herein. In its reply dated March 11, 1982, Respondent points out that the Board's decision affirms the Administrative Law Judge's finding that the discharge of two of the three employees involved did not violate the Act as alleged. The General Counsel's motion is granted.

[17] The average rate of absence in the forming department must have improved drastically from 1977 to 1980 for, as noted in Respondent's Exhibit 12—the November 20, 1977, Reagan writeup, the average for the period between sometime in August and November 20, 1977, was said to be 4 days.

statement of McGirt was not mentioned to the Board until the day before the hearing herein, and that:

> Reagan alleged that Supervisor Tesh coerced him within a few weeks of the discharge. For some unexplained reason, these alleged *threats* by John Tesh were never mentioned to the Board's field examiners until August 23, 1971—the day before the hearing—or 13 months after the discharge.[18] [Emphasis supplied.]

It is contended by Respondent that the General Counsel did not succeed under *Wright Line, supra*, enfd. 662 F.2d 899 (1st Cir. 1981), in establishing a *prima facie* case sufficient to support the inference that protected conduct was a motivating factor in the discharge of Reagan. Assertedly, the fact that Reagan was a member of IPOC is ancient history with no current motivational implications since the concerted activity culminated in an election in July 1978. Also, Respondent argues that the allegation that Reagan was threatened because of his union activity is weak, unbelievable, and conflicting, since Reagan did not mention the alleged Tesh "threats" or the McGirt threat to the Board until the day before the hearing herein.

Concluding, Respondent argues that "[o]f crucial and determinative significance is the absence of a scintilla of evidence, or even a contention, that Reagan was treated in a disparate manner." (Resp. br., p. 15.)

D. *Analysis*

During the campaign both sides fought hard and, to an extent, overstepped legal bounds. The Board determined in *PPG Industries, Inc.*, 251 NLRB 1146 at 1147 (1980), that there was extensive unlawful activity by Respondent. The unlawful activity continued even after the election and even after the results of the election were certified. In *PPG Industries, Inc., supra*, the Board affirmed an Administrative Law Judge's finding that one of the three employees involved in that proceeding was discharged unlawfully in November 1979. The Board, in its above-described 1980 *PPG Industries, Inc., supra*, decision, also affirmed another Administrative Law Judge's findings that other PPG employees had been unlawfully discharged. As noted above, because of the conduct of the IPOC the Fourth Circuit found that the election was not fair.

Contrary to the impression Respondent attempts to convey on brief, motivational implications of the concerted activity were not ancient history after the election in July 1978. Also, contrary to the impression Respondent attempts to convey on brief, the record does not support the assertion that Reagan mentioned the alleged Tesh "threats" for the first time to the Board the day before the hearing began herein. There is testimony in the record about whether Reagan mentioned one of the alleged Tesh threats to the Board for the first time on August 23, 1981. That testimony did not cover, however, the other Tesh statement allegedly made just days before Reagan's discharge.

Tesh is a relatively new supervisor who was promoted during the attempted unionization of the involved plant. As pointed out by the General Counsel, his testimony was not credited in the earlier Board proceeding for the reasons specified in footnote 14, *supra*. Similarly, his testimony herein cannot be credited. Both supervisors who were present at Reagan's discharge interview indicated that Reagan expressed displeasure at the way he was treated by his supervisors. Clearly Reagan was upset. He testified that the week before he was fired he complained twice to Foreman Tesh about the way he was being treated by management. Tesh denies this. According to Reagan's testimony, both complaints drew responses from Tesh which are now the subject, in part, of the complaint involved herein. Consequently, it is understandable why Tesh would want to deny hearing the complaints, for fear of having to admit his responses. Reagan's testimony that he made the complaints to Tesh is credited. Moreover, Reagan's testimony regarding the responses elicited by the complaints is credited. Tesh made the threats; his denial is not credited. Tesh impressed me as being an individual who would not concede even the obvious if he believed it might be detrimental to Respondent. Tesh was not a credible witness. As alleged, Respondent violated 8(a)(1) of the Act with these threats made the week before Reagan was discharged.

The other coercive statements described above were offered by the General Counsel as background only. Reagan's testimony regarding them is credited. In view of all the circumstances, the denials were not convincing. Additionally, Respondent's witnesses who testified about these statements did not impress me as being credible witnesses.

Respondent's antiunion sentiment, as evidence in the prior Board proceedings, was strong. It was placed on notice that Reagan was on the IPOC, the activities of which ultimately caused the invalidation of the election. And, as found above, Reagan was threatened with being fired for his protected activity by Tesh just the week before Reagan was discharged. On the other hand, Reagan did not have a good attendance record dating back to before the organizing campaign, he had previously received written warnings about his absences, and he had a past history of failing to report his absences. But as pointed out by the General Counsel after the March 1980 reprimand Reagan had improved his attendance. Respondent asserts that Reagan was fired because of the July 27 unreported absence and because of his overall absence record. The July 1980 review of Reagan's absence record was triggered by the alleged July 27 unreported absence. Respondent's assertion that absent this there probably would have been a review and similar disposition is not convincing. Subsequent to Reagan's March 11 writeup he was sick on May 3, he was excused sick for 7 hours on Saturday, May 31 (which counted as an absence since Reagan was out for more than 4 hours), and the next day, Sunday, June 1, he reported sick. If absences alone would have triggered a

[18] Resp. br., p. 9. The transcript cite refers to one of Tesh's alleged statements; namely, "Well, I told you time and time again not to be messing with the union; the only thing it can do is to get . . . [you] in trouble." As indicated above, it is alleged that Tesh also made other statements to Reagan.

review, one must wonder why such a review did not occur in the beginning of June 1980.[19] Similarly, I am not convinced that Reagan failed to report his absence on July 27. In my opinion, the General Counsel has met the burden of proof. The testimony of Reagan, his wife, and his 14-year old daughter convince me that he did report his absence on July 27. Admittedly the wife was not present when he made the call, and since the daughter did not hear exactly what was said, it could be argued that she may have overheard nothing more than Reagan mumbling to himself after getting a busy signal. But Reagan testified that he reported his absence. Taking into consideration his limited education, Reagan impressed me as being a credible witness. His testimony that he asked York to be excused from work on July 26 is credited. York's assertion that he did not recall the request is not credited. While Reagan thought he spoke with York on July 27 when he reported his absence, he may have spoken with someone else. If York took the call his denial cannot be credited. If someone else took the call, York's assertion regarding the correct procedure does not mean the procedure, in fact, was followed.

Why would Respondent fire Reagan in July 1980 if he did report his absence and not in May-June 1980 when he was also absent? Perhaps the answer lies in the fact that the week before he was fired Reagan complained to his supervisor because, in his opinion, he was not being treated fairly. As indicated by Tesh's responses to the complaints, Reagan could not expect fair treatment since he was a union supporter. It was one thing for Reagan to quietly tolerate his treatment and run the risk of Respondent compiling a poor production record on Reagan's area of responsibility (which could have been necessitated by Reagan's improving absence record). It was quite another thing for him to thwart any such attempt by giving up the job of tank captain and then complain about his treatment to management. Perhaps the latter could not be tolerated.

In my opinion the reason given by Respondent for Reagan's discharge is pretextual, and *Wright Line, supra*, therefore, does not apply. In the event it did apply, the General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Since Reagan was not fired in the beginning of June for his absences, it must be concluded that he would not have been fired in July 1980 but for his protected activities and his complaints made the week before his discharge.

In unlawfully discharging Reagan, Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening Ronald Reagan on or about July 25, 1980, that his union activities would get him in trouble with Respondent and he ultimately would be discharged.

4. Respondent violated Section 8(a)(1) and (3) by discharging Ronald Reagan on July 29, 1980.

5. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it will be directed to cease and desist from engaging in such conduct or like or related conduct and take affirmative action designed to effectuate the policies of the Act. Further, Respondent will be directed to offer Ronald Reagan reinstatement to his former position and to make him whole for any loss of earnings he may have suffered by reason of the above-described unlawful actions, by making payments to him of a sum of money equal to that which he normally would have earned had Respondent not engaged in the above-described unlawful action, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[20] Respondent will be directed to preserve and make available to the Board, upon request, all payroll records, and reports, and all other records necessary and useful to determine the amount of backpay due in compliance with this Decision and Order.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, PPG Industries, Inc., Lexington Plant, Fiber Glass Division, Lexington, North Carolina, its officers, agents, sucessors, and assigns, shall:

1. Cease and desist from:

(a) Threatening any employee with getting into trouble with Respondent and with discharge for exercising rights guaranteed under Section 7 of the Act.

(b) Discharging or otherwise discriminating against employees to discourage union activity.

(c) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Ronald Reagan immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prej-

[19] Strong testified that "you may or you may not consider the reported death on [July] 22" as an absence. It would appear, therefore, that at the time of Reagan's discharge Strong had not conclusively determined to consider the reported death as a chargeable absence. Consequently, Reagan had two chargeable absences in July.

[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

udice to his seniority or other rights and privileges and make him whole for any loss of pay he may have suffered by reason of Respondent's discrimination against him with backpay and interest thereon to be computed in the manner set forth above.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its Lexington, North Carolina, plant copies of the attached notice marked "Appendix."[22] Copies of said notice, on forms provided by the Regional Director for Region 11, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for 60 consecutive days. Reasonable steps shall be taken to ensure that notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that Respondent violated Section 8(a)(5) of the Act by unilaterally reinstituting a requirement in December 1980 that employees be physically relieved at their individual job stations before they could leave work, and, pursuant to the unilateral change, terminating Janice Yoast Mitchell.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."